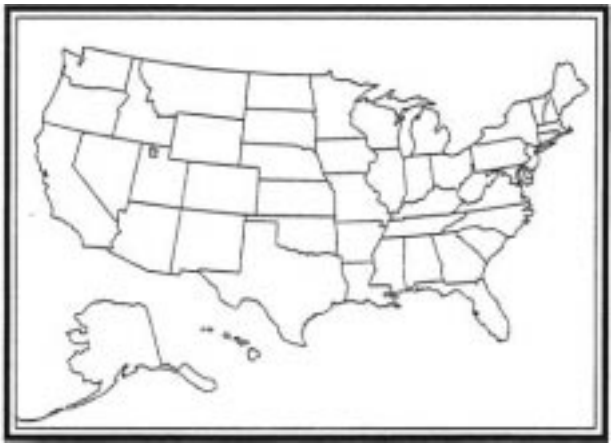
NAAG

DOE ENVIRONMENTAL ISSUES BULLETIN

DECEMBER 1995/JANUARY 1996



THE ANTI-DEFICIENCY ACT: IS THE FAILURE TO OBTAIN FUNDING A DEFENSE FOR THE FEDERAL GOVERNMENT?

Point By Susan M. McMichael*

States that enforce environmental laws against the federal government have a unique problem to confront: the Anti-Deficiency Act (ADA). The ADA was enacted in 1870 and prohibits officers and employees of the United States from spending or contracting to spend funds which have not been appropriated by Congress. 31 U.S.C. § 1341. States that issue compliance orders against the federal government for civil penalties and/or corrective action may confront the ADA during settlement negotiations when the federal government insists that the State allow for nonperformance when congressional funding is unavailable. For instance, the government may require a clause in a settlement agreement which states that "any requirement for payment or obligation of funds by the federal agency established under the agreement shall be subject to the ADA." As explained below, there are several arguments States could raise as support that the ADA is inapplicable and should not be a valid defense to the payment of civil penalties or corrective action required for a federal facility to comply with environmental laws. Further, States should refuse to enter into a settlement or consent agreement which recognizes that the obligations of the federal government are contingent upon congressional funding. The ADA provides, in relevant part:

> An officer or employee of the United States Government . . . may not (a) make or authorize an expenditure or obligation exceeding an amount available in an appropriation; or (b) fund for the expenditure or obligation or involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341(l).

The principle underlying the ADA is not new. It is axiomatic that Congress establishes federal government expenditures and that officers of the United States cannot obligate funds which have not been appropriated. The ADA embodies the constitutional principle that the appropriation of public funds is a legislative function reserved for Congress, and not the executive branch.

The federal government's position that payment of civil penalties or an action required to comply with a state enforcement action is subject to the ADA appears to be misplaced for several reasons. There is a long line of cases holding that a failure to obtain congressional appropriations is not a defense or bar to a statutory duty of the federal government where the duty to preform the obligation is statutorily mandated. See e.g. New *York Airways, Inc. v. United States, 369* F.2d 743, 748 (Ct. Cl. 1966) ("[i]t has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing substantive law, expressly or by clear implication, does not in and of itself defeat a government obligation created by statute. . . the failure to appropriate funds to meet statutory obligations prevents the [federal] officers from making disbursements, but such rights are enforceable in the *Court."); Lovett v. United States, 66* F. Supp. 142, 146 (Ct. Cl. 1945) ("In a long line of cases it has been held that the failure of appropriation does not . . . preclude recovery for compensation otherwise due."); *Parsons v. United States,* 15 Cl. Ct. 246, 247 (1880) ("this Court has held repeatedly that the absence of an appropriation constitutes no bar to recovery of a judgement in cases where the liability of the government has been established.").

This principle is reflected more recently *in Blue Legs v. United States Bureau of Indian Affairs, 867* F.2d 1094 (8th Cir. 1989). In that case, the Eighth Circuit ordered the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) to clean up solid waste dumps on certain Indian lands as required by the Resource Conservation and Recovery Act (RCRA). On remand, the federal defendants argued that they did not have to comply with the Eighth Circuit order because they lacked the funding authority to remedy the RCRA violations. 732 F. Supp. 81 (D.S.D. 1990). The district court rejected the federal defendants' argument stating that "to take such a position in the face of the appellate decision is preposterous." *Id.* at 81.

Further, a review of cases interpreting the applicability of the ADA reveal that the ADA applies to procurement or multi-year contracts, where the duty to perform is expressly contingent upon adequate congressional appropriations. See *e.g. Turbines Inter'n v. United States, 3* Cl. Ct. 489 (1983) (ADA requires that multi-year procurement contracts contain a clause that the government and contractor cannot perform duty until contractor isnotified that funds are available). However, where the duty to perform is not contingent upon funding, courts have found that the ADA is inapplicable. See *San Carlos Irrigation & Drainage Dist. v. United States, 23* Cl. Ct. 276 (1991) (recovery by irrigation district against the United States for failure to maintain and operate a dam was not barred by the ADA where the federal government did not attempt to obtain appropriations from Congress and duty to operate and maintain is not contingent upon congressional appropriations). See *also In re Olin Corp. v. US. Army,* 1989 WL 253222 (RCRA appeal No. 88-18; 11/22/89) (EPA Regional Administrator found that a government contractor was required to be named as co-permittee to RCRA permit; the ADA defense was "purely speculative" and would defeat statutory mandate that owners and operators of RCRA facilities remain responsible for compliance with hazardous waste laws).

In a state enforcement action, the ADA should not defeat the statutory mandate that federal facilities are responsible for compliance with

environmental laws regardless of whether compliance is ordered or negotiated. With a compliance order, the federal government neither "make[s] or authorize[s]" an expenditure or obligation nor "involve[s] the government in a contract or obligation" under 31 U.S.C. § 1341 (a)(l)(2). The fact that the federal government enters into a settlement agreement arising from a state enforcement action should not change the result. The applicability of the ADA appears to hinge upon whether the underlying "obligation" or "contract" is contingent upon congressional funding, either by statute or contract. In a state enforcement action, the underlying obligation of the federal government to comply with state and federal environmental laws is statutorily mandated and not contingent upon adequate congressional funding. In the legislative history of the Federal Facility Compliance Act of 1992, Congress repeatedly states that with regard to the payment of civil penalties, federal facilities are to be placed "on equal footing" as private industry and further, there are several sources of funding from existing congressional mechanisms that provide for the payment of civil penalties. Pub.L. 102-386,106 Stat. 1505. H.Rep. 1301-1303 (1992).

Hence; the ADA should not operate as a defense or excuse to the payment of civil penalties or corrective actions required for a federal facility to comply with environmental laws. Although the lack or lapse of funding may result in a delay or failure to perform, the State has an enforceable right to require compliance and the ADA should not "defeat a government obligation created by statute." New *York Airways, 369* F.2d at 748.

---

[1] Ms. McMichael is an Assistant General Counsel with the New Mexico Environment Department. The views of this author do not necessarily represent the position of the New Mexico Environment Department.

Counterpoint By C. Dean Monroe, III*

As stated recently by the Office of Legal Counsel of the U. S. Department of Justice, "the Anti-Deficiency Act imposes substantial restrictions on obligating funds or contracting for services in advance of appropriations or beyond appropriated levels." DOE has attempted to deal with these restrictions by including in all DOE cleanup agreements language that insufficient availability of appropriated funds is a valid defense to enforcement of specific requirements agreed to by the parties as part of an existing cleanup agreement. As developed in 1988 with input from states and NAAG, the model language includes the force. *majeure* clause concerning the consequences of insufficient availability of appropriated funds.

While some states, such as Idaho and Tennessee, did not agree and reserved their rights to assert to the contrary, some states did agree that where DOE had requested timely funding and the Congress had not appropriated sufficient funds to allow specific activities to be performed, DOE could exercise *the force majeure* defense based on lack of funding to avoid stipulated penalties or independent enforcement by states. (It is interesting that DOE has never invoked this defense under any of its existing cleanup agreements with EPA and states under CERCLA).

Also, while the Anti-Deficiency Act has been interpreted by some courts not to excuse requirements imposed by states, that is not to say that it is not a valid defense when exercised in the context of a particular cleanup agreement. That is, although DOE is not excused from performing the activity altogether by virtue of the Anti-Deficiency Act, it does appear that activities could be delayed based on lack of available funding for such purposes. Milestones set for particular fiscal years might be modified, where states and EPA approve, to occur in later fiscal years.

The effect of the Anti-Deficiency Act is, as intended, not to prevent expenditures but to prevent expenditures in cases where there are not sufficient funds for the obligation. The Act implements the requirement that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law" under Article 1 of the United States Constitution, section 9, clause 7. While some may perceive this as a convenient escape route for federal agencies, most will perceive the Anti-Deficiency Act as a simple yet profound statement of the fact that the government cannot incur obligations where there are no funds available.

---

[1] The author, a staff attorney with DOE's Office of General Counsel and a former Assistant Attorney General for the State of Alabama, expresses his own views and not those of the Department of Energy.

The National Association of Attorneys General is pleased to announce it has hired a new attorney for the Environment Project. Gail Miller, formerly with the Office of the Corporation Counsel of the District of Columbia, will replace Wib Chesser as lead counsel for DOE activities. Ms. Miller brings several years of environmental litigation experience to NAAG and has worked with the Department of Justice, the National Wildlife Federation and Skadden, Arps, Slate, Meagher & Flom. Gail joins the Association on January 22, 1996.

Lauren Beuhler, Temporary Environment Associate, will remain with the Association as the Environment Project's Law Clerk. As many of you know, Ms. Buehler has done an excellent job serving as the Temporary Environment Associate and many thanks are well deserved.

THE DEPARTMENT OF ENERGY'S ALTERNATIVE DISPUTE RESOLUTION PROGRAM

By: Phyllis Hanfling, Director
Office of Dispute Resolution

The Department of Energy's Office of Dispute Resolution was established in December 1995, in Response to the Administrative Dispute Resolution Act (ADRA), § 5 U.S.C. § 571 et seq., which authorizes and encourages federal agencies to employ consensual methods of dispute resolution. Under the ADRA, each federal agency is required to designate a senior official as a dispute resolution specialist, establish a policy addressing the agency's use of alternative dispute resolution (ADR), review contracts and grants for appropriate inclusion of ADR clauses and provide for department wide training on ADR.

Congress enacted the ADRA to reduce the time, cost, inefficiencies and contentiousness that too often are associated with litigation. These themes are echoed in the recommendations for increased use of ADR included in the Report of the National Performance Review and in the Negotiated Rulemaking Act, 5 U.S.C. § et seq., which established a framework for using a neutral third party to convene and then facilitate negotiations between an agency and those parties who will be affected by a new rule.

DOE's interim ADR policy statement has just been published. It emphasizes the Department's commitment to the use of ADR as a management tool to prevent or minimize the escalation of disputes, and to resolve disputes at the earliest possible stage. DOE will be considering various methods of ADR, especially mediation when appropriate, in all types of disputes, both internal and external to the agency.

Mediation is a voluntary, informal and confidential process in which a trained neutral assists parties in settling a dispute. The mediator

has no power to make decisions for the parties or to force them to reach agreement. Thus, mediation provides a unique opportunity for parties to design their own solutions to their conflict. These solutions are binding only if all participantsagree; therefore, other than time and the cost of a mediator, there is no downside risk. If the parties cannot reach an agreement through mediation, they are free to pursue all other available options.

Since the emphasis of the Department's ADR effort is on prevention of disputes, or at least, early intervention, i.e., before litigation has been initiated, DOE headquarters has recently announced the DOE Mediation Service. This resource offers the assistance of DOE employees who have been trained as mediators to help in resolving workplace conflicts. The Department hopes that this will lead to diminished friction, increased productivity and a reduction in the escalation of disputes.

The Department has also used mediation in some administrative cases. Recently a very large oil overcharge case, in litigation for 14 years, was settled through a multi-party mediation. This settlement will lead to disbursements of approximately $128 million over 5 years to all the states, on a pro rata basis depending on energy usage during the period of oil price controls. DOE has estimated the savings in future litigation costs to the Department alone as approximately *$500,000.*

In line with the emphasis on using ADR for prevention and early intervention, the Department is training its contracting officers to understand and utilize ADR when they are unable to settle contracting disputes and bid protests. In the environmental area, agencies such as EPA have long used mediation for enforcement cases under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Resource Conservation Recovery Act (RCRA), Clean Air Act, and other statutes. They have also had significant success with negotiated rulemakings.

At DOE, other than policy dialogues occurring at several of the sites, there has as yet been little use of ADR in this area. We have however, proposed language incorporating the use of mediation as an adjunct to the dispute resolution language in compliance agreements. In many cases, the assistance of a trained and experienced mediator can help parties who might be stalemated reach a mutually agreeable settlement.

Once cases are in litigation, we can expect to see more government participation in mediation, both because of its increased use by courts throughout the country and because of the Department of Justice's new emphasis on ADR, which includes educating all of its attorneys about mediation.

At this early stage of DOE's program, much education and training is still needed about ADR and its benefits -- savings of time and increasingly scarcer resources, more control by the parties over process and outcome, a higher rate of compliance and less contentiousness for parties who have a continuing relationship. We hope that the states will join us in encouraging and supporting this endeavor.

For additional information, please contact Phyllis Hanfling, Director; Office of Dispute Resolution at (202) 586-4972.

NAAG/DOE Meeting in Albuquerque

The next DOE/NAAG Workgroup Meeting is scheduled for May l-3, 1996 in Albuquerque, New Mexico. The tentative agenda includes a tour of Los Alamos National Laboratory on the first day, discussion panels among DOE and NAAG Workgroup members on the second day, and the final half-day is for States only. The agenda for the tour and discussion topics is currently being developed jointly by the States and DOE.

NEWS BRIEFS

- On December 6, 1995, Secretary O'Leary announced a formal Record of Decision for a dual-track strategy to assure a future tritium source. The analysis to support these decisions was issued October 20, 1995, in the Final Programmatic Environmental Impact Statement for Tritium Supply and Recycling. One track will explore the purchase of an operating or partially complete commercial light-water reactor or the purchase of irradiation services from such a reactor. The second track will be to design, build, and test critical components of an accelerator system for production of tritium. The Department's Savannah River Site has been selected as the location for an accelerator, should one be built. Savannah's tritium recycling facilities will be upgraded and consolidated to support either option. A tritium extraction facility will also be constructed at the Site. To obtain a copy of the Record of Decision, call DOE's Office of Reconfiguration at l-800-776-2765. The Record of Decision may also be accessed on Internet at FEDIX.FIE.COM.

- EH-41 Announces New INTERNET Homepage. The U.S. Department of Energy (DOE), Office of Environmental Policy and Assistance (EH-41) has announced the availability of a new homepage on the INTERNET. The new homepage may be accessed either via the DOE Homepage or by using the address: HTTP//www.eh.doe.gov/oepa/oepa.htm. Forty environmental guidance documents are available for local viewing and printing from the Homepage. For more information on the EH-41 Homepage, contact Katherine Nakata (EH-413) at (202) 586-0801, or fax (202) 586-3915, or e-mail katherine.nakata@hq.doe.gov.

- On December 18, 1995 the National Governors' Association (NGA) published a summary of its October 18-20 NGA/DOE FFCA Task Force Meeting. Some of the attachments to the summary include: DOE's Scorecard of FFCA Site Treatment Plans and Orders.; Defense Nuclear Facilities Safety Board Recommendation 94-2 (DNFSB 94-2); and the Senior Review Panel Report on DOE performance evaluations of 15 DOE sites. If you would like more information, contact Ann Beuchesne, NGA, at 202/624-5370 or Michele Gagnon, NAAG, at 202/434-8040

- *Public Comment Period Extended 60 Days on the Draft Waste Management Programmatic Environmental Impact Statement (EIS).* The public comment period on the Draft Waste Management Progammatic Environmental Impact Statement (WMPEIS) will be extended from December 21, 1995 to February 19, 1996. This sixty-day extension responds to requests from the public for additional time to review the draft and follows a ninety-day comment period that opened on September 22, 1995. The WMPEIS analyzes alternatives for the treatment, storage and disposal of DOE's radioactive, hazardous and mixed waste (radioactive and hazardous components) from fifty-four sites over a period of 20 years. Copies of the document can be obtained by contacting the Environmental Management Information's toll-free number l-800-736-3282.

DOE ENVIRONMENTAL ISSUES BULLETIN is published 10 times per year by the Environment Project of the National Association of Attorneys General, 444 North Capitol Street, Suite 339, Washington, D.C. 20001. This bulletin is edited by Wilburn L. Chesser, Environment Counsel. Subscription rate: $75.00 per year. For subscription services, call (202) 434-8030. For general inquiries, call NAAG Director of Information Services, (202) 434-8022.

The publication of this bulletin is funded, in part, by the U.S. Environmental Protection Agency and the U.S. Department of Energy under cooperative agreement number CX-821045-01-0. The contents of this bulletin do not necessarily reflect the views and policies of the U.S. Environmental Protection Agency, the U.S. Department of Energy, or the National Association of Attorneys General, nor does mention of trade names or commercial products constitute endorsement or recommendation for use.